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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Miner Group, Limited

Serial No. 75/414,441

Gerald E. Helget and Kevin W. Cyr of Rider Bennett Egan & Arundel for The Miner Group, Limited.

Andrea Koyner Nadelman, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Miner Group, Limited has appealed from the final refusal of the Trademark Examining Attorney to register the mark CHERISHED MEMORIES for "scrapbook stickers"<sup>1</sup> in International Class 16.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark CHERISHED

<sup>1</sup> Application Serial No. 75/414,441 filed on January 6, 1998 based upon an allegation of use in interstate commerce since at least as early as September 16, 1997.

MEMORIES previously registered for "paint for arts and crafts" in International Class 2, and for "stencils, stencil adhesive dots and sponges for applying paint,"<sup>2</sup> in International Class 16, that, as used on applicant's scrapbook stickers, it is likely to cause confusion, to cause mistake or to deceive.

The appeal has been fully briefed, but an oral hearing was not requested. We affirm the refusal of registration.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the respective marks. The marks are identical as to sound and appearance. Given the identical connotation of this term as applied to the respective goods, we conclude that the overall commercial impression of the term "Cherished Memories" is exactly the same for both marks.

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<sup>2</sup> Reg. No. 2,236,192 issued on March 30, 1999.

It is well settled that where the marks in question are identical, it is not necessary for the goods with which they are used to be closely related in order for confusion to be found likely. It is sufficient, instead, if the goods are related in some viable way such that the use of the same mark in connection therewith would be likely to lead to the mistaken assumption that a single source is responsible for both. In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). It is also true that in resolving the issue of likelihood of confusion, the Board must consider the goods as identified in the application and the cited registration, respectively, without restrictions or limitations not reflected therein. In re Elbaum, 211 USPQ 639 (TTAB 1981), and Toys "R" Us, Inc. v. Lamps R Us, 219 USPQ 340 (TTAB 1983).

When the issue before us in this appeal is considered in conjunction with these two principles, we conclude that notwithstanding applicant's argument to the contrary, the goods, as they are identified in the application and registration, are indeed closely related.

Applicant argues that its goods - scrapbook stickers - will be purchased by a different class of purchasers from those who would use the "paint for arts and crafts" and

"stencils, stencil adhesive dots and sponges for applying paint" identified in the cited registration:

... Paint for arts and crafts, and stencils, stencil adhesive dots and sponges for applying paint all relate to painting and are therefore purchased by artists and painters. Scrapbook stickers and even more generally, stickers have nothing to do with painting and are typically marketed to those who are less artistically inclined. Paints and stencils are tools of artistic expression, the image from their use varying with the imagination of the artists, whereas stickers are simply a prefabricated means for decoration. An artist using paints and stencils, even in the rare instance that the artist may be making a scrapbook, would typically not use stickers. Conversely, an individual using stickers to decorate a scrapbook would be highly unlikely to go to the trouble of using paints.

(Applicant's reply brief, p.3).

None of the above distinctions as argued by applicant with respect to the purchasers or users of applicant's and registrant's goods is reflected in the ways these goods are identified in the application and the registration. For example, stencils could be used for a myriad of possible uses, including making scrapbooks. Several third-party registrations made part of the record by the Trademark Examining Attorney list stencils along with stickers as components or accessories for making scrapbooks, photograph albums and other paper crafts.<sup>3</sup> Accordingly, we must assume

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<sup>3</sup> For example, Reg. No. 2,350,542, MAKE A MEMORY for "scrapbook album kits and accessories therefor, namely, borders, sheet protectors, photograph mounts, stickers, stencils and insert pages" and Reg. No. 2,296,095, PHOTO PARTY for

that registrant's stencils could be the kind of stencils that will be used in putting together a scrapbook, and could be used in conjunction with the scrapbook stickers identified herein.

Furthermore, although applicant argues that artists and painters would purchase registrant's paints, the goods are identified as "paint for arts and crafts." Such goods could be purchased by anyone who wished to engage in arts and craft projects, not just the artists that applicant envisions.

Under these circumstances, for one acquainted with registrant's CHERISHED MEMORIES paints and stencils, the use of the identical mark on applicant's goods would lead a prospective purchaser to assume, mistakenly, as it would turn out, that a single source was responsible for both CHERISHED MEMORIES scrapbook stickers and CHERISHED MEMORIES paint and stencils.

Applicant's argument that confusion is not likely because the CHERISHED MEMORIES mark is weak also fails:

Furthermore, both CHERISHED and MEMORIES are extensively used throughout international class 16. CHERISHED was identified in 15 records and MEMORIES was identified in 181 records in the search of the

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"scrapbooks, photograph albums, and accessories for making customized albums, namely, album pages, photo paper backing sheets, stickers and stencils." [emphasis supplied].

U.S. Patent and Trademark Office's online trademark database.

(Applicant's reply brief, p. 2).

We note that these alleged third-party registrations were not properly made of record. In order to make third-party registrations of record, soft copies of the registrations or printouts from the U.S. Patent and Trademark Office electronic database must be submitted. See Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230 (TTAB 1992). This was not done. Furthermore, the printouts of the search results were an exhibit attached to applicant's reply brief, and hence were manifestly untimely. The record must be complete prior to the time of the appeal. See, 37 CFR 2.142(d); In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994). Accordingly, we have not considered this evidence in reaching our decision.<sup>4</sup>

Furthermore, even if the record did establish (which it does not) that the registered mark is highly suggestive (as argued by applicant) for components of albums or "memory books," even "highly suggestive marks are entitled to protection against the identical mark for goods used for

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<sup>4</sup> We hasten to add that even if we were to consider these lists, it would not change the result herein. Except for registrant's cited mark, none of the subsisting third-party registrations referenced by applicant in its reply brief is for the words "CHERISHED MEMORIES."

closely related purposes." In re Textron Inc., 180 USPQ 341 (TTAB 1973).

Accordingly, given that these are identical marks used on closely related goods purchased by the same class of purchasers, we find a likelihood of confusion.

*Decision:* The refusal to register under Section 2(d) of the Act is affirmed.